

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

JOHN A. GREGORY

PLAINTIFF

V.

NO. 1:95CV139-B-D

DREW ROSENHAUS

DEFENDANT

MEMORANDUM OPINION

This cause comes before the court on the defendant's motion to dismiss for lack of in personam jurisdiction and alternative motion to dismiss for failure to state a claim upon which relief can be granted. The court has duly considered the parties' memoranda and exhibits and is ready to rule.

On December 26, 1995, the defendant filed a motion for leave to file supplemental affidavits. The plaintiff opposes the motion on the ground that the supplemental affidavits do not pertain to transactions, occurrences or events which have occurred since the submission of the defendant's rebuttal brief. See Fed. R. Civ. P. 15(d). The defendant seeks leave to file the supplemental affidavits "for purposes of clarification and in response to Plaintiff's Affidavits." The motion was filed forty days after the rebuttal brief was served and after the court had studied the briefs and begun writing this opinion. The court finds that the motion is not well taken since it gives no explanation for the failure to submit the affidavits contemporaneously with the rebuttal brief. The defendant was even granted an extension of

time to serve the rebuttal brief. Therefore, the defendant's motion for leave to file supplemental affidavits should be denied.

I. Personal Jurisdiction

The plaintiff must make a prima facie showing that the defendant falls within the reach of the state long-arm statute and that exercise of personal jurisdiction over the defendant is permissible under the fourteenth amendment due process clause. Dalton v. R&W Marine Inc., 897 F.2d 1359 (5th Cir. 1990); Thompson v. Chrysler Motors Corp., 755 F.2d 1162, 1165-66 (5th Cir. 1985).

The Mississippi long-arm statute reads in part:

Any nonresident person, firm, general or limited partnership, or any foreign or other corporation not qualified under the Constitution and laws of this state as to doing business herein, who shall make a contract with a resident of this state to be performed in whole or in part by any party in this state, or who shall commit a tort in whole or in part in this state against a resident or nonresident of this state, or who shall do any business or perform any character of work or service in this state, shall by such act or acts be deemed to be doing business in Mississippi and shall thereby be subjected to the jurisdiction of the courts of this state.

Miss. Code Ann. § 13-3-57.

The plaintiff, a National Football League (NFL) advisor, alleges wrongful interference (no pun intended) by the defendant with the written contract between NFL player Timothy Bowens and the plaintiff in his capacity as a NFL contract advisor. The contract entitled "Contract Representation Agreement" [the

plaintiff's contract], executed on March 5, 1994, provides that the plaintiff "agrees to represent, advise, counsel, and assist Player in the negotiation, execution, and enforcement of his playing contract(s) in the National Football League." The contract further sets forth the plaintiff's fee for any successful negotiation of a NFL player contract signed by Bowens.

The defendant's affidavit states that he is a permanent resident of Florida with a principal place of business in Florida and at no time has maintained any business or office in Mississippi. His affidavit further states that he initially met with Bowens in late April, 1994 in Florida when Bowens approached him. Bowens' affidavit states that he initially approached the defendant after terminating the plaintiff's contract. Bowens states that he signed a contract representation agreement with the defendant [the defendant's contract] in Florida on April 30, 1994. The defendant states that he visited Mississippi on only two occasions and they were after Bowens executed the defendant's contract. Bowens states that he met with the defendant on two occasions in Mississippi after he terminated the plaintiff's contract.¹ However, the uncontroverted affidavit of Sue Blankenship, the plaintiff's secretary, states that on May 3, 1994

¹The defendant's supporting memorandum states that the defendant's affidavit, as well as Bowens' affidavit, asserts that the defendant visited Mississippi only after Bowens had terminated his relationship with the plaintiff; however, this is a misstatement of the facts as described in the affidavits.

Bowens, accompanied by the defendant, hand delivered a notice of termination of the plaintiff's contract in the plaintiff's Okolona, Mississippi office. The uncontroverted affidavit of the plaintiff states that on May 4, 1994, he received Bowens' notice of termination dated May 2, 1994 and had received no prior notice.

The defendant asserts that the allegation of the plaintiff's economic loss in Mississippi is insufficient. Under the tort prong of the Mississippi long-arm statute, a tort occurs 'where and when the actual injury takes place, not at the place of the economic consequences of the injury.' Falco Lime, Inc. v. Tide Towing Co., 779 F. Supp. 58, 61 (N.D. Miss. 1991) (quoting Cycles, Ltd. v. W.J. Digby, Inc., 889 F.2d 612, 619 (5th Cir. 1989)). The defendant does not dispute that he accompanied Bowens when he delivered his notice of termination to the plaintiff's office in Mississippi. The defendant contends that this fact, standing alone, fails to show that he committed a tort in Mississippi. However, the plaintiff must show only that the defendant committed the alleged tort in part in Mississippi. The defendant's involvement or participation in Bowens' termination of the plaintiff's contract can constitute an element of the alleged tortious interference. Any injury caused by the tort of contractual interference, if proved, occurred, at least in part, in the plaintiff's Mississippi office at the time of delivery of the notice of termination. Therefore, the court finds that the plaintiff has made a prima

facie showing that the alleged tort may have been committed in part in Mississippi and therefore falls within the reach of the long-arm statute.

The due process issue requires a finding that the nonresident defendant has (1) purposefully established "minimum contacts" with the forum state and (2) that entertainment of the suit against the nonresident would not offend "traditional notions of fair play and substantial justice." Bullion v. Gillespie, 895 F. 2d 213, 216 (5th Cir. 1990) (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)). "Minimum contacts with the forum state may arise incident to the federal court's 'general' or 'specific' jurisdiction over the nonresident defendant." Falco Lime, Inc., 779 F. Supp. at 62. There is no showing of general jurisdiction over the defendant in the absence of 'continuous and systematic contacts' with Mississippi. Id. at 62 (quoting Interfirst Bank Clifton v. Ferandez, 844 F.2d 279, 283 (5th Cir.), op. amended on other grounds, 853 F.2d 292 (5th Cir. 1988)). The issue is whether the defendant's two visits to Mississippi constitute sufficient contacts giving rise to or related to the alleged tort, with respect to specific jurisdiction over the defendant. Falco Lime, Inc., 779 F. Supp. at 62. The court must consider the number of contacts in conjunction with the nature and quality of the contacts to determine whether the nonresident defendant purposefully availed himself of the privilege of conducting his activities in

Mississippi. Id. at 62-63.

A reasonable inference may be drawn that the defendant's accompaniment of Bowens to the plaintiff's office on May 3, 1994 was pursuant to the termination of the plaintiff's contract. The fact that Bowens had previously executed the defendant's contract does not in any way negate the possibility of the defendant's tortious interference with the plaintiff's contract in Mississippi. According to Bowens, the defendant's two visits to Mississippi occurred after Bowens terminated the plaintiff's contract. This assertion is in conflict with the undisputed presence of the defendant in the plaintiff's office on May 3, 1994. The defendant admits that he has visited Mississippi twice and does not state the reasons for either visit. Bowens' affidavit establishes that the defendant met **with him** in Mississippi on two occasions. Assuming arguendo that the May 3 visit was one of the defendant's two visits to Mississippi, a reasonable inference may be drawn that the other visit also pertained to the furtherance of his contractual relationship with Bowens and the status of the plaintiff's contract. A connection between the defendant's contacts to Mississippi and the alleged tort may also be reasonably inferred from paragraph 7 of Bowens' affidavit:

At no time did [the defendant] and I meet in the State of Mississippi with regard to the prospect of [the defendant] becoming my agent or to sign a National Football League Professional Association Contract until after I terminated my contract with [the plaintiff].

The court finds that the defendant had sufficient contacts with Mississippi of a character indicative of his purposeful availment "of the privilege of conducting activities" in this forum, "thus invoking the benefits and protections of its laws." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474-75 (1985) (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)). The court further finds nothing unfair in subjecting the defendant to the jurisdiction of this court. Accordingly, the motion to dismiss for lack of personal jurisdiction should be denied.

II. Failure to State a Claim

The defendant alternatively moves to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12 (b)(6) of the Federal Rules of Civil Procedure. Since the affidavits submitted by both parties pertain to not only the issue of personal jurisdiction but also the viability of the plaintiff's claim, the court has construed this motion as a motion for summary judgment pursuant to Rule 12(b). See Clark v. Amoco Production Co., 794 F.2d 967, 972 (5th Cir. 1986) (a court may construe a Rule 12(b)(6) motion as a motion for summary judgment in order to consider information which does not appear on the face of the pleadings themselves).

On a motion for summary judgment, the movant has the initial burden of showing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 275

(1986) ("the burden on the moving party may be discharged by 'showing'... that there is an absence of evidence to support the nonmoving party's case"). Under Rule 56(e) of the Federal Rules of Civil Procedure, the burden shifts to the nonmovant to "go beyond the pleadings and by ... affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex Corp., 477 U.S. at 324, 91 L. Ed. 2d at 274. That burden is not discharged by "mere allegations or denials." Rule 56(e). All legitimate factual inferences must be made in favor of the nonmovant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 216 (1986). Rule 56(c) mandates the entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322, 91 L. Ed. 2d at 273. Before finding that no genuine issue for trial exists, the court must first be satisfied that no reasonable trier of fact could find for the nonmovant. Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 552 (1986).

Under Mississippi law, the plaintiff must show the following elements to prevail on a claim of tortious interference with a contract:

1. Intentional and wilful acts;

2. Acts calculated to cause damage to the plaintiff in a lawful business;

3. Acts committed with the unlawful purpose of causing damage and loss without right or justifiable cause on the part of the defendant (which constitutes malice); and

4. Actual damage and loss.

F.D.I.C. v. Brewer, 823 F. Supp. 1341, 1349 (S.D. Miss. 1993) (applying Mississippi law); Cenac v. Murry, 609 So. 2d 1257, 1268-69 (Miss. 1992). The Mississippi Supreme Court has stated:

An action for interference with the contract ordinarily lies when "a party maliciously interferes with a valid and enforceable contract...causing one party not to perform and resulting in injury to the other contracting party."

Nichols v. Tri-State Brick and Tile Co., 608 So. 2d 324, 328 (Miss. 1992) (quoting Mid-Continent Telephone Corp. v. Home Telephone Co., 319 F. Supp. 1176, 1199 (N.D. Miss. 1970)).

The defendant makes a conclusory assertion that the plaintiff's contract was terminable at will and therefore unenforceable for purposes of an interference claim. Section III entitled "Term" in the plaintiff's contract states in part:

The terms and conditions of this Agreement **shall begin on the date hereof and continue for a period of five (5) years** herefrom. That either party may terminate this Agreement effective fifteen (15) days after written notice of the termination is given to the other party **upon just cause being shown by said notice.**

As noted by the Mississippi Supreme Court, "numerous cases from

other states" do not recognize a right of recovery for interference with a contract terminable at will in the employment context. Shaw v. Burchfield, 481 So. 2d 247, 255 (Miss. 1985). The Mississippi Supreme Court has not expressly recognized a cause of action against an intervening third party for tortious interference with an at will employment contract. In any event, the court finds that the plaintiff's contract was not terminable at will. In Mississippi, a contract that neither specifies the term of the contractual relations nor requires just cause for termination is terminable at will. Perry v. Sears, Roebuck & Co., 508 So. 2d 1086, 1088 (Miss. 1987) (employment at will); Kelly v. Mississippi Valley Gas Co., 397 So. 2d 874, 874-75 (Miss. 1981) (Under the employment at will doctrine, "either the employer or the employee may have a good reason, a wrong reason, or no reason for terminating the employment contract"). The recurring issue in employment cases is whether disciplinary guidelines in the employee handbook modify the at will status by imposing a just-cause standard for dismissal. E.g., Samples v. Hall of Mississippi, Inc., 673 F. Supp. 1413, 1417 (N.D. Miss. 1987). By its express terms, the plaintiff's contract in the instant cause has a five-year term and allows termination for "just cause" only.

The affidavits of Bowens and the defendant state that the defendant did not solicit, persuade or induce Bowens to

disassociate from the plaintiff.² Even if Bowens first approached the defendant in Florida, the defendant's affidavit does not state that he had no knowledge of the plaintiff's contract when he executed his contract with Bowens.³ Although Bowens' affidavit states that he approached the defendant after terminating the plaintiff's contract, in fact he met and executed a contract with the defendant before giving the plaintiff notice of termination. A material issue of fact may be drawn from Blankenship's affidavit that the defendant knew of the existence of the plaintiff's contract on May 3 when he accompanied Bowens to the plaintiff's office. The defendant contends that knowledge alone cannot constitute tortious interference. Under Mississippi law,

[t]he element of willfulness and calculation does not require a showing on the part of the plaintiff that defendant had a specific intent to deprive plaintiff of contractual rights. Rather, the requisite intent is inferred when defendant knows of the existence of a contract and does a wrongful act without legal or social justification that he is certain or substantially certain will

²Paragraph 4 of the defendant's affidavit is ambiguous:

At no time did I meet with, solicit,
persuade, or induce Timothy Bowens to
disassociate from his former agent, to wit:
John A. Gregory in the State of Mississippi.

The assertion could arguably be construed as only a denial of any solicitation or inducement in Mississippi.

³The defendant's supporting memorandum asserts that "Bowens communicated to [the defendant] that he had terminated his relationship with his previous agent" sometime after introducing himself to the defendant. However, no exhibit attached to the instant motion corroborates this assertion.

result in interference with the contract.

Liston v. Home Ins. Co., 659 F. Supp. 276, 281 (S.D. Miss. 1986).

The court rejects the defendant's argument that since the defendant's contract was executed before Bowens' termination of the plaintiff's contract, the defendant could not have possibly contributed to tortious interference with the plaintiff's contract.⁴ Execution of the defendant's contract when the plaintiff's preexisting contract with Bowens was still in effect raises an issue of material fact as to tortious interference with the plaintiff's contract. In addition, participation in the termination of the plaintiff's contract would be in furtherance of the defendant's contractual relationship with Bowens since both contracts were executed pursuant to negotiating a NFL player contract on behalf of Bowens. In fact the defendant did successfully negotiate a NFL contract between the Miami Dolphins and Bowens.

Since the plaintiff's contract was not terminable at will, the defendant did not have the right to compete with the plaintiff, with respect to Bowens. The defendant contends that the reasons set forth in Bowens' affidavit for seeking a new agent are independent of his affiliation with the defendant and indicative of

⁴This argument is presented in the defendant's rebuttal memorandum. Yet, the defendant's initial memorandum relied on Bowens' affidavit, attached to the instant motion, which erroneously states that Bowens terminated the plaintiff's contract before approaching the defendant.

a unilateral decision on Bowens' part. The court finds that Bowens' purported reasons for seeking a new agent do not provide justification for the defendant's alleged interference with the plaintiff's contract since, even if he did not know of the plaintiff's preexisting contract at the time his contract was executed, he arguably acquired such knowledge sometime between April 30 and May 3.

The defendant further contends that any damages sustained by the plaintiff are too speculative and cannot be ascertained with reasonable certainty. S&W Constr. & Materials Co. v. Dravo Basic Materials Co., 813 F. Supp. 1214 (S.D. Miss. 1992), aff'd, 1 F.3d 1238 (5th Cir. 1993). The plaintiff's contract provides a fixed fee as a specified percentage of Bowens' earnings in the event a NFL contract were successfully negotiated by the plaintiff and executed by Bowens. The court does not find it persuasive as to the damages issue that the plaintiff had not negotiated any NFL contract at the time of termination. Termination of the plaintiff's contract precluded the plaintiff from acting in the capacity of Bowens' agent for the purpose of negotiating any NFL contracts. In light of Bowens' career, it appears more likely than not that Bowens would have been recruited by the Miami Dolphins or another NFL team on the basis of his ability, regardless of the identity of his agent. The plaintiff lost the opportunity to pursue possibly lucrative options for Bowens and earn a fee.

Accordingly, the court does not find the damages too speculative to withstand a motion for summary judgment.

CONCLUSION

For the foregoing reasons, the court finds that there are genuine issues of material fact as to the defendant's interference with the plaintiff's contract. Accordingly, the motion to dismiss converted to a motion for summary judgment should be denied.

An order will issue accordingly.

THIS, the _____ day of February, 1996.

NEAL B. BIGGERS, JR.
UNITED STATES DISTRICT JUDGE